IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID NIEMAN, Defendant.	No. CR 06-3021-MWB **PRELIMINARY AND FINAL INSTRUCTIONS TO THE JURY**

TABLE OF CONTENTS

PRELIMINARY INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, I am giving you these Preliminary Instructions to help you better understand the trial and your role in it and to instruct you on the law that you must apply in this case. Consider these instructions, together with all written and oral instructions given to you during or at the end of the trial, and apply them as a whole to the facts of the case. In considering these instructions, the order in which they are given is not important.

As explained during jury selection, in an Indictment, a Grand Jury charges defendant David Nieman with the following offenses: **Count 1** charges a "drug conspiracy" offense; **Counts 2, 3, and 4** charge separate "distribution of methamphetamine" offenses; **Count 5** charges a "possession with intent to distribute" offense; **Count 6** charges a "drug user in possession of a firearm" offense; **Count 7** charges a "possession of a firearm in furtherance of drug trafficking" offense; and, finally, **Count 8** charges a "money laundering conspiracy" offense.

As I also explained during jury selection, an "indictment" is simply an accusation. It is not evidence of anything. The defendant is presumed to be innocent of each offense charged against him, unless and until the prosecution proves his guilt on that offense beyond a reasonable doubt. The defendant has pled not guilty to the crimes charged against him.

Your duty is to decide from the evidence whether the defendant is not guilty or guilty of each charge against him. You will find the facts from the evidence.

You are entitled to consider that evidence in light of your own observations and experiences. You may use reason and common sense to draw conclusions from facts that have been established by the evidence. You will then apply the law, which I will give you in my instructions, to the facts to reach your verdict. You are the sole judges of the facts, but you must follow the law as stated in my instructions, whether you agree with it or not.

Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, based solely on the evidence, your common sense, and the law as I give it to you. Do not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be. Similarly, do not conclude from any ruling or other comment I may make that I have any opinions on how you should decide the case.

Please remember that only defendant David Nieman, not anyone else, is on trial here. Also, remember that this defendant is on trial *only* for the offense or offenses charged against him in the Indictment, not for anything else.

The defendant is entitled to have each charge against him considered separately based solely on the evidence that applies to that charge. *Therefore, you must return a separate, unanimous verdict on each offense charged against the defendant*.

PRELIMINARY INSTRUCTION NO. 2 - PRELIMINARY MATTERS

Before I turn to specific Preliminary Instructions on the offenses charged in this case, I must explain some preliminary matters.

"Elements"

The offenses charged in this case each consist of "elements," which the prosecution must prove beyond a reasonable doubt against the defendant in order to convict the defendant of that offense. I will summarize in the following Preliminary Instructions the elements of the offenses with which the defendant is charged.

Timing

The Indictment alleges that the offenses charged were committed "between about" two dates or "on or about" a certain date. The prosecution does not have to prove with certainty the exact date of an offense charged. It is sufficient if the evidence establishes that an offense occurred within a reasonable time of the date or time period alleged for that offense in the Indictment.

Controlled substances

In these instructions, when I refer to a "controlled substance," I mean any drug or narcotic the manufacture, possession, possession with intent to distribute, or distribution of which is prohibited or regulated by federal law. A mixture or substance containing a detectable amount of methamphetamine, which I will call simply a "methamphetamine mixture," and actual (pure) methamphetamine are both "controlled substances." Actual (pure) methamphetamine is methamphetamine itself—that is, either by itself or contained in a mixture or substance. A

"methamphetamine mixture," on the other hand, is a mixture or substance containing a detectable amount of "actual (pure) methamphetamine."

"Knowledge" and "Intent"

The elements of the charged offenses may require proof of what the defendant "intended" or "knew." Where whether a defendant acted "knowingly" or "intentionally" is an element of an offense, the defendant's "knowledge" or "intent" must be proved beyond a reasonable doubt. "Knowledge" and "intent" are mental states. It is seldom, if ever, possible to determine directly the operations of the human mind. However, mental states may be proved like anything else, from reasonable inferences and deductions drawn from the facts proved by the evidence. Therefore, you may consider any statements made or acts done by the defendant in question and all of the facts and circumstances in evidence to aid you in the determination of that defendant's "knowledge" or "intent."

An act was done "knowingly" if the defendant was aware of the act and did not act through ignorance, mistake, or accident. The prosecution is not required to prove that the defendant knew that his acts or omissions were unlawful. An act was done "intentionally" if it was done voluntarily, without coercion, and not because of ignorance, mistake, accident, or inadvertence.

"Possession," "Distribution," and "Delivery"

Some of the drug-trafficking offenses charged in the Indictment allegedly involved "possession," "possession with intent to distribute," or "distribution" of one or more controlled substances. "Distribution," in turn, involves "delivery."

The following definitions of "possession," "distribution," and "delivery" apply in these instructions:

The law recognizes several kinds of "possession." A person who knowingly has direct physical control over an item, at a given time, is then in "actual possession" of it. A person who, although not in actual possession, has both the power and the intention at a given time to exercise control over an item, either directly or through another person or persons, is then in "constructive possession" of it. If one person alone has actual or constructive possession of an item, possession is "sole." If two or more persons share actual or constructive possession of an item, possession is "joint." Whenever the word "possession" is used in these instructions, it includes "actual" as well as "constructive" possession and also "sole" as well as "joint" possession.

In addition, mere presence where an item was found or mere physical proximity to the item is insufficient to establish "possession" of that item. Knowledge of the presence of the item, at the same time one has control over the item or the place in which it was found, is required. Thus, in order to establish a person's "possession" of an item, the prosecution must establish that, at the same time, (a) the person knew of the presence of the item; (b) the person intended to exercise control over the item or place in which it was found; (c) the person had the power to exercise control over the item or place in which it was found; and (d) the person knew that he had the power to exercise control over the item or place in which it was found.

The term "distribute" means to deliver a controlled substance to the actual or constructive possession of another person. The term "deliver" means the actual, constructive, or attempted transfer of a controlled substance to the actual or constructive possession of another person. It is not necessary that money or anything of value change hands. The law prohibits "distribution," an agreement to "distribute," and "possession with intent to distribute" a controlled substance; the prosecution does not have to prove that there was or was intended to be a "sale" of a controlled substance to prove distribution, a conspiracy to distribute, or possession with intent to distribute that controlled substance.

* * *

I will now give you more specific Preliminary Instructions about the offenses charged in the Indictment. However, please remember that these Preliminary Instructions on the charged offenses provide only a preliminary outline of the requirements for proof of these offenses. At the end of the trial, I will give you further written Final Instructions on these matters. Because the Final Instructions are more detailed, you should rely on those Final Instructions, rather than these Preliminary Instructions, where there is a difference.

PRELIMINARY INSTRUCTION NO. 3 - COUNT 1: THE DRUG CONSPIRACY

Count 1 of the Indictment charges that, between about 1997 and May 2006, defendant David Nieman knowingly and unlawfully conspired with other persons, whose names are known and unknown to the Grand Jury, to commit one or more of the following offenses, or "objectives": (1) distributing 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine; and (2) distributing 50 grams or more of actual (pure) methamphetamine. The defendant denies that he committed this offense.

For you to find the defendant guilty of this "drug conspiracy" offense, the prosecution must prove beyond a reasonable doubt *all* of the following essential elements as to that defendant:

One, between about 1997 and May 2006, two or more persons reached an agreement or came to an understanding to commit one or both of the offenses identified as objectives of the conspiracy;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and

Three, at the time that the defendant joined in the agreement or understanding, the defendant knew the purpose of the agreement or understanding.

For you to find the defendant guilty of the "drug conspiracy" offense charged in **Count 1** of the Indictment, the prosecution must prove beyond a reasonable doubt

all of these essential elements. Otherwise, you must find the defendant not guilty of the "drug conspiracy" offense charged in **Count 1**.

In addition, if you find the defendant guilty of this "drug conspiracy" offense, then you must also determine beyond a reasonable doubt the quantity of any controlled substances actually involved in the conspiracy for which the defendant can be held responsible, as determination of drug quantity is explained briefly in Preliminary Instruction No. 7.

PRELIMINARY INSTRUCTION NO. 4 - COUNT 1: "OBJECTIVES" OF THE DRUG CONSPIRACY

The "drug conspiracy" charge alleges that the conspirators agreed to commit one or both of the following offenses, or "objectives": (1) distributing 500 grams or more of a methamphetamine mixture; and (2) distributing 50 grams or more of actual (pure) methamphetamine. To assist you in determining whether there was an agreement to commit either or both of these offenses, you should consider the elements of these "distribution" objectives.

To prove that a person distributed a controlled substance, the prosecution would have to prove beyond a reasonable doubt the following elements:

One, on or about the date alleged, the person intentionally distributed a controlled substance to another; and

Two, at the time of the distribution, the person knew that what he was distributing was a controlled substance.

Keep in mind that the prosecution must prove that there was an *agreement* to commit either or both of the "distribution" offenses alleged as "objectives" to establish the guilt of the defendant on the "drug conspiracy" charge. The prosecution is *not* required to prove that there was an agreement to commit *both* "distribution" offenses. Also, the prosecution is *not* required to prove that any offense charged as an "objective" of the "drug conspiracy" *was actually committed*. In other words, the question is whether the defendant *agreed* to commit one or more of the "distribution" offenses charged as "objectives" of the drug conspiracy, not

whether that defendant or someone else *actually* committed any such "distribution" offenses.

PRELIMINARY INSTRUCTION NO. 5 - COUNTS 2, 3, AND 4: DISTRIBUTION

Counts 2, 3, and 4 of the Indictment charge that, on separate occasions, defendant David Nieman knowingly and intentionally distributed a methamphetamine mixture. **Count 2** charges such a distribution on or about May 3, 2006; **Count 3** charges such a distribution on or about May 12, 2006; and **Count 4** charges such a distribution on or about May 13, 2006. You must give separate consideration to each of these offenses. The defendant denies that he committed any of these "distribution" offenses.

For you to find the defendant guilty of a "distribution" offense, the prosecution must prove beyond a reasonable doubt *both* of the following essential elements:

One, on or about the date alleged in the Count in question, the defendant intentionally distributed a methamphetamine mixture to another; and

Two, at the time of the distribution, the defendant knew that what he was distributing was a controlled substance.

For you to find the defendant guilty of a "distribution" offense, as charged in **Count 2, 3 or 4** of the Indictment, the prosecution must prove beyond a reasonable doubt *both* of these essential elements as to the Count in question. Otherwise, you must find the defendant not guilty of the "distribution" offense charged in that Count.

PRELIMINARY INSTRUCTION NO. 6 - COUNT 5: POSSESSION WITH INTENT TO DISTRIBUTE

Count 5 of the Indictment charges that, on or about May 15, 2006, defendant David Nieman knowingly and intentionally possessed, with intent to distribute, 50 grams or more of actual (pure) methamphetamine. The defendant denies that he committed this "possession with intent to distribute" offense.

For you to find the defendant guilty of this "possession with intent to distribute" offense, the prosecution must prove beyond a reasonable doubt *all* of the following essential elements:

One, on or about May 15, 2006, the defendant was in possession of actual (pure) methamphetamine;

Two, the defendant knew that he was, or intended to be, in possession of a controlled substance; and

Three, the defendant intended to distribute some or all of the controlled substance to another person.

For you to find the defendant guilty of this "possession with intent to distribute" offense, as charged in **Count 5** of the Indictment, the prosecution must prove beyond a reasonable doubt *all* of these essential elements. Otherwise, you must find the defendant not guilty of the "possession with intent to distribute" offense charged in **Count 5**.

In addition, if you find the defendant guilty of this "possession with intent to distribute" offense, then you must also determine beyond a reasonable doubt the

quantity of any actual (pure) methamphetamine actually involved in this offense for which the defendant can be held responsible, as explained in Preliminary Jury Instruction No. 7.

INSTRUCTION NO. 7 - QUANTITY OF CONTROLLED SUBSTANCES

The offenses charged in **Counts 1** and **5** of the Indictment allegedly involved various quantities of either a methamphetamine mixture or actual (pure) methamphetamine or both. Where a specific quantity of a controlled substance is charged, the prosecution does not have to prove that the offense involved the amount or quantity of that controlled substance that is alleged in the Indictment. However, *if* you find a particular defendant guilty of the "drug conspiracy" offense charged in **Count 1** or the "possession with intent to distribute" offense charge in **Count 5**, *then* for such an offense you must determine the following matters *beyond a reasonable doubt*: (1) whether that offense actually involved the controlled substance or controlled substances alleged; and (2) the *total quantity*, in grams, of the controlled substance or controlled substances involved in that offense for which the defendant can be held responsible.

You must determine whether the "distribution" offenses charged in **Counts 2, 3, and 4** involved a methamphetamine mixture, but you need only determine whether those offenses involved a detectable amount of methamphetamine mixture, rather than a specific quantity of methamphetamine mixture.

In making the required determinations of quantity of controlled substances for **Counts 1** and **5**, you may consider all of the evidence in the case that may aid in the determination of these issues. You may find more or less than the charged quantity of any controlled substance, but you must find that the quantity you indicate in the

Verdict Form has been proved beyond a reasonable doubt as the quantity for which the defendant can be held responsible on that offense.

In making your determination of quantity as required, it may be helpful to remember that one pound is approximately equal to 453.6 grams and that one ounce is approximately equal to 28.34 grams.

INSTRUCTION NO. 8 - COUNT 6:
DRUG USER IN POSSESSION OF A FIREARM

Count 6 of the Indictment charges that, on or about May 15, 2006, defendant David Nieman, then being an unlawful user of methamphetamine, knowingly possessed one or more firearms in and affecting interstate commerce. This offense allegedly involved the defendant's possession of the following firearms:

(a) a Remington, 12 gauge shotgun, serial no. PC466231;
(b) a Benelli Super Black Eagle, 12 gauge shotgun, serial no. U291915;
(c) a Hi-Point Firearms, 9mm semi-auto rifle, serial no. B65913;
(d) a Charles Daly, 12 gauge shotgun, serial no. 3116078;
(e) a Savage Arms, .22 caliber bolt-action rifle, serial no. 939752;
(f) a Stevens Model 34 Savage Arms, .22 caliber rifle, no serial number;
(g) a Taurus, 9mm semi-auto pistol, serial no. TLJ82613D;
(h) a Ruger 10/22 carbine, .22 caliber semi-auto rifle, serial no. 122-60046,

The defendant denies that he committed this "drug user in possession of a firearm" offense.

For you to find the defendant guilty of this offense, the prosecution must prove *all* of the following essential elements beyond a reasonable doubt:

One, on or about May 15, 2006, the defendant knowingly possessed one or more firearms;

Two, during the time that the defendant possessed the firearm or firearms, he was an unlawful user of a controlled substance; and

Three, at some time during or before the defendant's possession of the firearm or firearms, each such firearm was transported across a state line.

For you to find the defendant guilty of the "drug user in possession of a firearm" offense charged in **Count 6**, the prosecution must prove *all* of these essential elements beyond a reasonable doubt. Otherwise, you must find the defendant not guilty of this offense.

INSTRUCTION NO. 9 - COUNT 7: POSSESSION OF A FIREARM IN FURTHERANCE OF DRUG TRAFFICKING

Count 7 of the Indictment charges that, on or about May 15, 2006, defendant David Nieman knowingly possessed one or more firearms in furtherance of the drug-trafficking crimes charged in Counts 1 and 5 of the Indictment. This offense allegedly involved possession of the following firearms:

(a) a Hi-Point Firearms, 9mm semi-auto rifle, serial no. B65913; and
(b) a Taurus, 9mm semi-auto pistol, serial no. TLJ82613D.

The defendant denies that he committed this "possession of a firearm in furtherance of drug trafficking" offense.

For you to find the defendant guilty of this offense, the government must prove *both* of the following essential elements beyond a reasonable doubt:

One, on or about May 15, 2006, the defendant committed one or more of the offenses charged in **Counts 1 and 5** of the Indictment; and

Two, the defendant knowingly possessed either or both of the firearms alleged in furtherance of that drug-trafficking offense or those drug-trafficking offenses.

For you to find the defendant guilty of the "possession of a firearm in furtherance of drug trafficking" offense charged in **Count 7** of the Indictment, the prosecution must prove beyond a reasonable doubt both of the essential elements of this offense. Otherwise, you must find the defendant not guilty of this offense.

PRELIMINARY INSTRUCTION NO. 10 - COUNT 8: THE MONEY-LAUNDERING CONSPIRACY

Count 8 of the Indictment charges that, between about 2003 and May 2006, defendant David Nieman knowingly and unlawfully conspired with other persons, whose names are known and unknown to the Grand Jury, to conduct and to attempt to conduct financial transactions that involved proceeds of distributing and possessing with intent to distribute methamphetamine with the intent to promote the carrying on of that unlawful activity, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity. The defendant denies that he committed this "money-laundering conspiracy" offense.

For you to find the defendant guilty of this "money-laundering conspiracy" offense, the prosecution must prove beyond a reasonable doubt *all* of the following essential elements:

One, between about 2003 and May 2006, two or more persons reached an agreement or came to an understanding to commit the money-laundering offense alleged to be the objective of the conspiracy;

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect; and

Three, at the time that the defendant joined in the agreement or understanding, he knew the essential purpose of the agreement or understanding.

For you to find the defendant guilty of the "money-laundering conspiracy" offense charged in **Count 8** of the Indictment, the prosecution must prove beyond a reasonable doubt *all* of these essential elements. Otherwise, you must find the defendant not guilty of the "money-laundering conspiracy" offense charged in **Count 1**.

PRELIMINARY INSTRUCTION NO. 11 - COUNT 8: "OBJECTIVE" OF THE MONEY-LAUNDERING CONSPIRACY

The "money-laundering conspiracy" charge alleges that the conspirators agreed to conduct and to attempt to conduct financial transactions that involved proceeds of distributing and possessing with intent to distribute methamphetamine with the intent to promote the carrying on of that unlawful activity, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity. I will describe this "objective" as "conducting transactions to promote drug trafficking." To assist you in determining whether there was an agreement to commit this "money-laundering" offense, you should consider the elements of such an offense.

To prove that a person committed the money-laundering offense of "conducting transactions to promote drug trafficking," the prosecution would have to prove beyond a reasonable doubt the following elements:

One, on or about the date alleged, the person conducted or attempted to conduct a financial transaction, which in any way or degree affected interstate or foreign commerce;

Two, the person conducted or attempted to conduct the financial transaction with United States currency that involved the proceeds of the illegal distribution of controlled substances or a conspiracy to distribute controlled substances;

Three, at the time the person conducted or attempted to conduct the financial transaction, the person knew that the United States currency represented the proceeds of some form of unlawful activity; and

Four, the person conducted or attempted to conduct the financial transaction with the intent to promote the carrying on of the illegal distribution of controlled substances or a conspiracy to distribute controlled substances.

A person "attempted to conduct" a financial transaction, if the person intended to conduct a financial transaction and voluntarily and intentionally carried out some act that was a substantial step toward completion of the transaction. A "substantial step" must be more than mere preparation, yet may be less than the last step necessary before the actual completion of the transaction. It must, however, be necessary to the consummation or completion of the transaction and be of such a nature that a reasonable observer, viewing it in context, could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to conduct a financial transaction.

I will now give you definitions of some of the terms used in this instruction:

"Financial transaction" means a transaction which in any way or degree affects interstate commerce involving the movement of funds by wire or other means.

"Transaction" means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of property.

"Interstate commerce" means commerce between any combination of states of the United States. "Commerce," in turn, includes, among other things, travel,

trade, transportation, and communication. It is not necessary for the prosecution to show that the defendant actually intended or anticipated an effect on interstate commerce. All that is necessary is that interstate commerce was affected as a natural and probably consequence of the defendant's actions. You may find an effect on interstate commerce if you find beyond a reasonable doubt from the evidence that currency used in the transaction was printed in Washington, D.C.

"Funds" means, among other things, United States currency.

"Proceeds" means any property, or any interest in property, that someone acquires as a result of the commission of the sale of illegal controlled substances. The prosecution is not required to trace the property that it alleges to be proceeds of the unlawful sale of controlled substances to a particular underlying offense. It is sufficient if the prosecution proves beyond a reasonable doubt that the property was the proceeds of the unlawful sale of controlled substances generally. For example, in a case involving alleged drug proceeds, such as this case, the prosecution would not have to trace the money to a particular drug offense, but could satisfy this requirement by proving that the money was the proceeds of drug trafficking generally. The prosecution also need not prove that all of the property involved in the transaction was the proceeds of the unlawful sale of drugs. Rather, it is sufficient if the prosecution proves that at least part of the property represented such proceeds.

"Knew the United States currency represented the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented the proceeds from some form, though not necessarily which

form, of activity that constitutes a felony offense under federal or state law. Thus, the prosecution need not prove that the defendant specifically knew that the United States currency involved in the financial transactions represented the proceeds of distributing controlled substances or any other specific offense; rather, the prosecution need only prove that the defendant knew that the currency represented the proceeds of some form, though not necessarily which form, of felony under federal or state law. As a matter of law, distributing controlled substances is a felony under federal law.

PRELIMINARY INSTRUCTION NO. 12 - PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The defendant is presumed innocent of each of the charges against him and, therefore, not guilty of those offenses. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact that he is here in court. The presumption of innocence remains with the defendant throughout the trial. That presumption alone is sufficient to find the defendant not guilty. The presumption of innocence may be overcome as to a particular charge against the defendant only if the prosecution proves, beyond a reasonable doubt, *all* of the elements of that offense against the defendant.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant to prove his innocence. Therefore, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses who are called to testify by the prosecution. Similarly, if the defendant does not testify, you must not consider that fact in any way, or even discuss it, in arriving at your verdict in this case.

Unless the prosecution proves beyond a reasonable doubt that the defendant has committed each and every element of an offense charged against him, you must find him not guilty of that offense.

PRELIMINARY INSTRUCTION NO. 13 - REASONABLE DOUBT

I have previously instructed you that the prosecution must prove a charged offense "beyond a reasonable doubt" for you to find the defendant guilty of that charged offense. A reasonable doubt may arise from the evidence produced by either the prosecution or the defendant, keeping in mind that the defendant never has the burden or duty of calling any witnesses or producing any evidence. It may also arise from the prosecution's lack of evidence. A reasonable doubt is a doubt based upon reason and common sense. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

PRELIMINARY INSTRUCTION NO. 14 - OUTLINE OF TRIAL

The trial will proceed as follows:

After these preliminary instructions, the prosecutor may make an opening statement. Next, the lawyer for the defendant may, but does not have to, make an opening statement. An opening statement is not evidence. It is simply a summary of what the lawyer expects the evidence to be.

The prosecution will then present its evidence and call witnesses, and the lawyer for the defendant may, but has no obligation to, cross-examine. Following the prosecution's case, the defendant may, but does not have to, present evidence and call witnesses. If the defendant calls witnesses, the prosecutor may cross-examine those witnesses.

After the evidence is concluded, I will give you most of the Final Instructions. The lawyers will then make their closing arguments to summarize and interpret the evidence for you. As with opening statements, closing arguments are not evidence. I will then give you the remaining Final Instructions on deliberations, and you will retire to deliberate on your verdict.

PRELIMINARY INSTRUCTION NO. 15 - DEFINITION OF EVIDENCE

Your verdict must be based only on the evidence presented in this case and these and any other Instructions that I may give you during the trial. Evidence is:

1. Testimony.

2. Exhibits that I admit into evidence.

3. Stipulations, which are agreements between the parties.

Evidence may be "direct" or "circumstantial." The law makes no distinction between the weight to be given to direct and circumstantial evidence. The weight to be given any evidence is for you to decide.

A particular item of evidence is sometimes admitted only for a limited purpose, and not for any other purpose. I will tell you if that happens, and instruct you on the purposes for which the item can and cannot be used.

The fact that an exhibit may be shown to you does not mean that you must rely on it more than you rely on other evidence.

The following are not evidence:

1. Statements, arguments, questions, and comments by the lawyers.

2. Objections and rulings on objections.

3. Testimony I tell you to disregard.

4. Anything you saw or heard about this case outside the courtroom.

The weight of the evidence is not determined merely by the number of witnesses testifying as to the existence or non-existence of any fact. Also, the weight of the evidence is not determined merely by the number or volume of

documents or exhibits. The weight of the evidence depends upon its quality, which means how convincing it is, and not merely upon its quantity. For example, you may choose to believe the testimony of one witness, if you find that witness to be convincing, even if a number of other witnesses contradict his or her testimony. The quality and weight of the evidence are for you to decide.

PRELIMINARY INSTRUCTION NO. 16 - CREDIBILITY OF WITNESSES

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness says, only part of it, or none of it.

In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to have seen or heard the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the witness's drug or alcohol use or addiction, if any, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe. In deciding whether or not to believe a witness, keep in mind that people sometimes see or hear things differently and sometimes forget things. You need to consider, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead from an intentional falsehood or pretended lapse of memory.

If the defendant testifies, you should judge his testimony in the same manner in which you judge the testimony of any other witness.

Ordinarily, witnesses may only testify to factual matters within their personal knowledge. However, you may hear evidence from persons described as experts. Persons may become qualified as experts in some field by knowledge, skill, training, education, or experience. Such experts may state their opinions on matters

in that field and may also state the reasons for their opinions. You should consider expert testimony just like any other testimony. You may believe all of what an expert says, only part of it, or none of it, considering the expert's qualifications, the soundness of the reasons given for the opinion, the acceptability of the methods used, any reason the expert may be biased, and all of the other evidence in the case.

Just because a witness works in law enforcement or is employed by the government does not mean you should give more weight or credence to such a witness's testimony than you give to any other witness's testimony.

PRELIMINARY INSTRUCTION NO. 17 - ACTS AND STATEMENTS OF CO-CONSPIRATORS

If you find beyond a reasonable doubt that the conspiracy charged in **Count 1** or the conspiracy charged in **Count 8** existed, and that the defendant was a member of that conspiracy, then you may consider acts knowingly done and statements knowingly made by other co-conspirators in that conspiracy during the existence of that conspiracy and in furtherance of that conspiracy as evidence pertaining to the defendant on that conspiracy charge, even if those acts were done or those statements were made in the defendant's absence and without his knowledge. This includes acts done or statements made before the defendant joined the conspiracy in question. On the other hand, an act or statement by someone other than the defendant that was not made during and in furtherance of the conspiracy in question cannot be attributed to the defendant in this way.

PRELIMINARY INSTRUCTION NO. 18 - BENCH CONFERENCES AND RECESSES

During the trial it may be necessary for me to talk with the lawyers out of your hearing, either by having a bench conference here while you are present in the courtroom, or by calling a recess. Please be patient, because while you are waiting, we are working. The purpose of these conferences is to decide how certain evidence is to be treated under the rules of evidence, to avoid confusion and error, and to save your valuable time. We will, of course, do what we can to keep the number and length of these conferences to a minimum.

PRELIMINARY INSTRUCTION NO. 19 - OBJECTIONS

The lawyers may make objections and motions during the trial that I must rule upon. If I sustain an objection to a question before it is answered, do not draw any inferences or conclusions from the question itself. Also, the lawyers have a duty to object to testimony or other evidence that they believe is not properly admissible. Do not hold it against a lawyer or the party the lawyer represents because the lawyer has made objections.

PRELIMINARY INSTRUCTION NO. 20 - NOTE-TAKING

If you want to take notes during the trial, you may, but be sure that your note-taking does not interfere with listening to and considering all the evidence. If you choose not to take notes, remember it is your own individual responsibility to listen carefully to the evidence.

Notes you take during the trial are not necessarily more reliable than your memory or another juror's memory. Therefore, you should not be overly influenced by the notes.

If you take notes, do not discuss them with anyone before you begin your deliberations. At the end of each day, please leave your notes on your chair. At the end of the trial, you may take your notes out of the notebook and keep them, or leave them, and we will destroy them. No one will read the notes, either during or after the trial.

You will notice that we have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching your verdict.

PRELIMINARY INSTRUCTION NO. 21 - CONDUCT OF THE JURY DURING TRIAL

You must decide this case based ***solely*** on the evidence presented in court, in light of your own observations, experiences, reason, and common sense. Therefore, to insure fairness, you, as jurors, must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdict.

Second, do not talk with anyone else about this case or about anyone involved with it until the trial has ended and you have been discharged as jurors.

Third, when you are outside the courtroom do not let anyone tell you anything about the case, or about anyone involved with it, or about any news story, rumor, or gossip about this case, or ask you about your participation in this case until the trial has ended and your verdict has been accepted by me. If someone should try to talk to you about the case during the trial, please report it to me.

Fourth, during the trial you should not talk with or speak to any of the parties, lawyers, or witnesses involved in this case—you should not even pass the time of day with any of them. It is important that you not only do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the case sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party, or witness does not speak to you when you pass

in the hall, ride the elevator or the like, it is because they are not supposed to talk or visit with you.

Fifth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it, or let anyone tell you anything about any such news reports. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case you will know more about the matter than anyone will learn through the news media.

Sixth, do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation *about this case* on your own.

Seventh, do not make up your mind during the trial about what the verdict should be. Do not discuss this case with anyone, not even with other jurors, until I send you to the jury room for deliberations after closing arguments. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Eighth, if at anytime during the trial you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer, who will deliver it to me. I want you to be comfortable, so please do not hesitate to inform me of any problem.

DATED this 20th day of February, 2007.

Mark W. Bennett

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

FINAL INSTRUCTION NO. 1 - INTRODUCTION

Members of the jury, the written Instructions I gave you at the beginning of the trial and the oral Instructions I gave you during the trial remain in effect. I now give you some additional Final Instructions.

The Final Instructions I am about to give you, as well as the Preliminary Instructions given to you at the beginning of the trial, are in writing and will be available to you in the jury room. *All* Instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the Preliminary Instructions I gave you at the beginning of the trial are not repeated here.

I will now give you more detailed Instructions on the requirements for proof of the offenses charged in this case.

FINAL INSTRUCTION NO. 2 - COUNT 1: THE DRUG CONSPIRACY

Count 1 of the Indictment charges that, between about 1997 and May 2006, defendant David Nieman knowingly and unlawfully conspired with other persons, whose names are known and unknown to the Grand Jury, to commit one or more of the following offenses, or "objectives": (1) distributing 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine; and (2) distributing 50 grams or more of actual (pure) methamphetamine. The defendant denies that he committed this offense.

For you to find the defendant guilty of this "drug conspiracy" offense, the prosecution must prove beyond a reasonable doubt *all* of the following essential elements:

One, between about 1997 and May 2006, two or more persons reached an agreement or came to an understanding to commit one or both of the offenses identified as objectives of the conspiracy.

> The prosecution must prove that the defendant reached an agreement or understanding with at least one other person. The other person or persons do not have to be defendants, or named in the Indictment, or otherwise charged with a crime. There is no requirement that any other conspirators be named as long as you find beyond a reasonable doubt that there was at least one other co-conspirator besides the defendant.
>
> The "agreement or understanding" need not be an express or formal agreement or be in writing or cover all the details of how it is to be carried out. Nor is it

necessary that the members have directly stated between themselves the details or purpose of the scheme. In determining whether the alleged agreement existed, you may consider the actions and statements of all of the alleged participants, whether they are charged as defendants or not. The agreement may be inferred from all of the circumstances and the conduct of the alleged participants.

The "drug conspiracy" charge alleges that the conspirators agreed to commit the following offenses, or "objectives": (1) distributing 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine; and (2) distributing 50 grams or more of actual (pure) methamphetamine. To assist you in determining whether there was an agreement to commit either or both of these offenses, you should consider the elements of these "objectives." The elements of these "objectives" are set out for you in Preliminary Jury Instruction No. 4.

Also keep in mind that the prosecution must prove that there was an *agreement* to commit either or both of the "distribution" offenses alleged as "objectives" to establish the guilt of the defendant on the "drug conspiracy" charge. The prosecution is *not* required to prove that there was an agreement to commit *both* "distribution" offenses. Also, the prosecution is *not* required to prove that any offense charged as an "objective" of the "drug conspiracy" *was actually committed*. In other words, the question is whether the defendant *agreed* to commit one or more of the "distribution" offenses charged as "objectives" of the drug conspiracy, not whether that defendant or someone else *actually* committed any such "distribution" offenses.

> If there was no agreement, there was no conspiracy. Similarly, if you find that there was an agreement, but you find that the defendant did not join in that agreement, or did not know the purpose of the agreement, then you cannot find the defendant guilty of the "conspiracy" charge.

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time that it was first reached or at some later time while it was still in effect.

> You should understand that merely being present at the scene of an event, or merely acting in the same way as others, or merely associating with others does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of one, does not thereby become a member. Similarly, mere knowledge of the existence of a conspiracy, or mere knowledge that a controlled substance is being distributed or possessed with intent to distribute, is not enough to prove that the defendant joined in the conspiracy; rather, the prosecution must establish some degree of knowing involvement and cooperation by the defendant.
>
> On the other hand, a person may join in an agreement or understanding, as required by this element, without knowing all the details of the agreement or understanding, and without knowing who all the other members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person

has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

In deciding whether the defendant voluntarily and intentionally joined in the agreement, you must consider only evidence of the defendant's own actions and statements. You may not consider actions and pretrial statements of others, except to the extent that pretrial statements of others describe something that the defendant said or did.

Three, at the time that the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding.

The defendant must have known of the existence and purpose of the conspiracy. Without such knowledge, the defendant cannot be guilty of conspiracy, even if his acts furthered the conspiracy.

If the prosecution has not proved beyond a reasonable doubt *all* of the essential elements of this offense against the defendant, then you must find the defendant not guilty of the "drug conspiracy" offense charged in **Count 1** of the Indictment. On the other hand, if the prosecution has proved beyond a reasonable doubt *all* of the essential elements of this offense against the defendant, then you must find him guilty of the "drug conspiracy" charged in **Count 1**.

In addition, if you find the defendant guilty of the "drug conspiracy" charge in **Count 1**, then you must also determine beyond a reasonable doubt whether the conspiracy actually involved one or more of the controlled substances alleged *and* the quantity of any such controlled substance or controlled substances actually involved in the conspiracy for which the defendant can be held responsible, as determination of drug quantity is explained in Final Jury Instruction No. 5.

FINAL INSTRUCTION NO. 3 - COUNTS 2, 3, AND 4: DISTRIBUTION

Counts 2, 3, and 4 of the Indictment charge that, on separate occasions, defendant David Nieman knowingly and intentionally distributed a methamphetamine mixture. **Count 2** charges such a distribution on or about May 3, 2006; **Count 3** charges such a distribution on or about May 12, 2006; and **Count 4** charges such a distribution on or about May 13, 2006. You must give separate consideration to each of these offenses. The defendant denies that he committed any of these "distribution" offenses.

For you to find the defendant guilty of a "distribution" offense, the prosecution must prove beyond a reasonable doubt *both* of the following essential elements:

One, on or about the date alleged in the Count in question, the defendant intentionally distributed a methamphetamine mixture to another.

> "Distribution" was defined for you in Preliminary Jury Instruction No. 2. You must ascertain whether or not the substance in question was, in fact, a methamphetamine mixture. In so doing, you may consider all of the evidence in the case that may aid in the determination of that issue.

Two, at the time of the distribution, the defendant knew that what he was distributing was a controlled substance.

> "Knowledge" was defined for you in Preliminary Jury Instruction No. 2. Additionally, the defendant need

> not have known what the controlled substance was, if the defendant knew that he had possession of some controlled substance.

If the prosecution has not proved beyond a reasonable doubt *both* of the essential elements as to a particular "distribution" offense, as charged in **Count 2, 3, or 4**, then you must find the defendant not guilty of the "distribution" offense in question. On the other hand, if the prosecution has proved beyond a reasonable doubt *both* of the essential elements of a particular "distribution" offense against the defendant, then you must find him guilty of that "distribution" offense.

FINAL INSTRUCTION NO. 4 - COUNT 5: POSSESSION WITH INTENT TO DISTRIBUTE

Count 5 of the Indictment charges that, on or about May 15, 2006, defendant David Nieman knowingly and intentionally possessed, with intent to distribute, 50 grams or more of actual (pure) methamphetamine. The defendant denies that he committed this "possession with intent to distribute" offense.

For you to find the defendant guilty of this "possession with intent to distribute" offense, the prosecution must prove beyond a reasonable doubt *all* of the following essential elements:

One, on or about May 15, 2006, the defendant was in possession of actual (pure) methamphetamine.

> "Possession" was defined for you in Preliminary Jury Instruction No. 2. You must ascertain whether or not any substance in the defendant's possession was, in fact, actual (pure) methamphetamine.

Two, the defendant knew that he was, or intended to be, in possession of a controlled substance.

> "Knowledge" and "intent" were defined for you in Preliminary Jury Instruction No. 2. Additionally, the defendant need not have known what the controlled substance was, if the defendant knew that he had possession of some controlled substance.

Three, the defendant intended to distribute some or all of the controlled substance to another person.

> Again, "intent" was defined for you in Preliminary Jury Instruction No. 2. "Distribution" was also defined for you in Preliminary Jury Instruction No. 2. In addition, you may, but are not required to, infer an "intent to distribute" from the following evidence: drug purity, suggesting that the drugs are intended to be "cut" or diluted before distribution, if the evidence shows that the defendant was aware of such purity; the presence of firearms, cash, packaging material, or other distribution paraphernalia; and possession of a large quantity of actual (pure) methamphetamine in excess of what an individual user would consume.

If the prosecution has not proved beyond a reasonable doubt *all* of the essential elements of this offense against the defendant, then you must find the defendant not guilty of the "possession with intent to distribute" offense charged in **Count 5** of the Indictment. On the other hand, if the prosecution has proved beyond a reasonable doubt *all* of the essential elements of this offense against the defendant, then you must find him guilty of the "possession with intent to distribute" offense charged in **Count 5**.

In addition, if you find the defendant guilty of this "possession with intent to distribute" offense, then you must also determine beyond a reasonable doubt the quantity of any actual (pure) methamphetamine actually involved in this offense for which the defendant can be held responsible, as explained in Final Jury Instruction No. 5.

FINAL INSTRUCTION NO. 5 - QUANTITY OF CONTROLLED SUBSTANCES

The offenses charged in **Counts 1** (drug conspiracy) and **5** (possession with intent to distribute) allegedly involved various quantities of either a methamphetamine mixture or actual (pure) methamphetamine or both. Where a specific quantity of a controlled substance is charged, the prosecution does not have to prove that the offense involved the amount or quantity of the controlled substance alleged in the Indictment. However, *if* you find the defendant guilty of the "drug conspiracy" offense charged in **Count 1** or the "possession with intent to distribute" offense charged in **Count 5**, *then* for such an offense you must determine the following matters *beyond a reasonable doubt*: (1) whether that offense actually involved the controlled substance or controlled substances alleged; and (2) the *total quantity*, in grams, of the controlled substance or controlled substances involved in that offense for which the defendant can be held responsible.

You must determine whether the "distribution" offenses charged in **Counts 2, 3, and 4** involved a methamphetamine mixture, but you need only determine whether those offenses involved a detectable amount of methamphetamine mixture, rather than a specific quantity of methamphetamine mixture.

In making the required determinations of quantity of controlled substances for **Counts 1** and **5**, you may consider all of the evidence in the case that may aid in the determination of these issues. You may find more or less than the charged quantity of any controlled substance, but you must find that the quantity you indicate in the

Verdict Form has been proved beyond a reasonable doubt as the quantity for which the defendant can be held responsible on that offense.

Responsibility

A defendant guilty of ***conspiracy to distribute*** a controlled substance, as charged in **Count 1**, is responsible for the quantities of that controlled substance that he actually distributed or agreed to distribute. Such a defendant is also responsible for those quantities of the controlled substance that fellow conspirators distributed or agreed to distribute, if you find that the defendant could have reasonably foreseen, at the time that he joined the conspiracy or while the conspiracy lasted, that those prohibited acts were a necessary or natural consequence of the conspiracy. Controlled substances acquired for personal use should be included when determining the drug quantity for a "drug conspiracy" offense.

A defendant guilty of ***possession with intent to distribute*** a controlled substance, as charged in **Count 5** of the Indictment, is responsible for the quantities of that controlled substance that he actually possessed with intent to distribute, as "possession" is explained in Preliminary Jury Instruction No. 2, and "possession with intent to distribute" is explained more specifically in Final Jury Instruction No. 4, on page 46, in the explanation to element *three*. Controlled substances acquired for personal use should *not* be included when determining drug quantity for a "possession with intent to distribute" offense.

Determination of quantity and verdict

If you find the defendant guilty of either **Count 1** or **Count 5**, you must determine beyond a reasonable doubt the *total quantity*, in *grams*, of each controlled

substance involved in the offense in question for which you find that the defendant can be held responsible. You must then indicate in the Verdict Form the *range* within which that *total quantity* falls.

Thus, if you find the defendant guilty of the "drug conspiracy" charge in **Count 1**, and that the offense involved a methamphetamine mixture, then you must determine beyond a reasonable doubt whether the defendant can be held responsible for 500 grams or more, 50 grams or more but less than 500 grams, or less than 50 grams of a methamphetamine mixture. Similarly, if you find the defendant guilty of the "drug conspiracy" charge in **Count 1**, and that the offense involved actual (pure) methamphetamine, then you must determine beyond a reasonable doubt whether the defendant can be held responsible for 50 grams or more, 5 grams or more but less than 50 grams, or less than 5 grams of actual (pure) methamphetamine. If you find the defendant guilty of the "possession with intent to distribute" charge in **Count 5**, then you must determine beyond a reasonable doubt whether the defendant can be held responsible for 50 grams or more, 5 grams or more but less than 50 grams, or less than 5 grams of actual (pure) methamphetamine.

You may find more or less than the charged quantity of any controlled substance, but you must find that the quantity you indicate in the Verdict Form has been proved beyond a reasonable doubt as the quantity for which the defendant can be held responsible on that offense.

In making your determination of quantity as required, it may be helpful to remember that one pound is approximately equal to 453.6 grams, and that one ounce is approximately equal to 28.34 grams.

FINAL INSTRUCTION NO. 6 - COUNT 6: DRUG USER IN POSSESSION OF A FIREARM

Count 6 of the Indictment charges that, on or about May 15, 2006, defendant David Nieman, then being an unlawful user of methamphetamine, knowingly possessed one or more firearms in and affecting interstate commerce. The defendant denies that he committed this "drug user in possession of a firearm" offense.

For you to find the defendant guilty of this offense, the prosecution must prove *all* of the following essential elements beyond a reasonable doubt:

One, on or about May 15, 2006, the defendant knowingly possessed one or more firearms.

This offense allegedly involved the defendant's possession of the following firearms:

(a) a Remington, 12 gauge shotgun, serial no. PC466231;

(b) a Benelli Super Black Eagle, 12 gauge shotgun, serial no. U291915;

(c) a Hi-Point Firearms, 9mm semi-auto rifle, serial no. B65913;

(d) a Charles Daly, 12 gauge shotgun, serial no. 3116078;

(e) a Savage Arms, .22 caliber bolt-action rifle, serial no. 939752;

(f) a Stevens Model 34 Savage Arms, .22 caliber rifle, no serial number;

(g) a Taurus, 9mm semi-auto pistol, serial no. TLJ82613D;

(h) a Ruger 10/22 carbine, .22 caliber semi-auto rifle, serial no. 122-60046.

The defendant must have "knowingly possessed" at least one of these firearms. "Knowledge" and "possession" were both defined for you in Preliminary Jury Instruction No. 2.

It is an offense for an unlawful user of a controlled substance knowingly to possess a single firearm. Therefore, the prosecution does not have to prove that the defendant was in possession of more than one firearm. However, you must unanimously agree that the defendant possessed one or more firearms and which firearm or firearms they were.

Two, during the time that the defendant possessed the firearm or firearms, he was an unlawful user of a controlled substance.

An "unlawful user of a controlled substance" is a person who uses a controlled substance in a manner other than as prescribed by a licensed physician. The prosecution does not need to prove that the defendant was actually using or addicted to drugs at the exact moment he possessed the firearm in order to prove that he was an "unlawful user" in possession of that firearm. The prosecution must only prove that the defendant was an "unlawful user" or addicted to a controlled substance during the time that he possessed the firearm in question. Also, it is not enough if the defendant's use of a controlled substance was infrequent, only an isolated incident, or in the distant past. Instead, the defendant's unlawful use of a controlled substance must be consistent and prolonged, as well as contemporaneous with the possession of the firearm in question. That means that the defendant's unlawful use must have occurred recently

> enough to indicate that he was actively engaged in such conduct at the time that he possessed the firearm in question.

Three, at some time during or before the defendant's possession of the firearm or firearms, each such firearm was transported across a state line.

> The prosecution and the defendants have stipulated, that is, they have agreed, that the firearms in question were transported across a state line at some time before the defendants received or possessed those items, if the defendants did indeed possess them. Therefore, you must consider this element to be proved.

If the prosecution has not proved beyond a reasonable doubt *all* of the essential elements of this offense against the defendant, then you must find the defendant not guilty of the "drug user in possession of a firearm" offense charged in **Count 6** of the Indictment. On the other hand, if the prosecution has proved beyond a reasonable doubt *all* of the essential elements of this offense against the defendant, then you must find him guilty of the "drug user in possession of a firearm" offense charged in **Count 6**.

FINAL INSTRUCTION NO. 7 - COUNT 7: POSSESSION OF A FIREARM IN FURTHERANCE OF DRUG TRAFFICKING

Count 7 of the Indictment charges that, on or about May 15, 2006, defendant David Nieman knowingly possessed one or more firearms in furtherance of the drug-trafficking crimes charged in Counts 1 and 5 of the Indictment. The defendant denies that he committed this "possession of a firearm in furtherance of drug-trafficking" offense.

For you to find the defendant guilty of this offense, the government must prove *both* of the following essential elements beyond a reasonable doubt:

One, on or about May 15, 2006, the defendant committed one or more of the offenses charged in **Counts 1 and 5** of the Indictment.

Two, the defendant knowingly possessed one or more firearms in furtherance of that drug-trafficking offense or those drug-trafficking offenses.

> This offense allegedly involved possession of the following firearms:
>
> (a) a Hi-Point Firearms, 9mm semi-auto rifle, serial no. B65913; and
>
> (b) a Taurus, 9mm semi-auto pistol, serial no. TLJ82613D.
>
> The defendant must have "knowingly possessed" at least one of these firearms. "Knowledge" and "possession" were both defined for you in Preliminary Jury Instruction No. 2.
>
> The defendant must have possessed the firearm "in furtherance" of the drug-trafficking offense. "Furtherance" should be given its plain meaning, which

> is "the act of furthering, advancing, or helping forward." Thus, to prove that the defendant "possessed a firearm in furtherance of the drug-trafficking conspiracy," it is not enough for the prosecution to prove that the defendant simultaneously possessed a methamphetamine mix or actual (pure) methamphetamine and a firearm or that he possessed the firearm at the time that he conspired to distribute a methamphetamine mixture or actual (pure) methamphetamine. Instead, the prosecution must prove a connection between the defendant's possession of the firearm and the underlying drug-trafficking crimes.
>
> Therefore, in order to prove this element, the prosecution must prove beyond a reasonable doubt that the defendant possessed the firearm alleged and that the firearm had some purpose or effect with respect to the drug-trafficking crime in question. The presence and involvement of the firearm cannot just be the result of accident or coincidence. The firearm must have facilitated the drug-trafficking offense. For example, the handy availability of a firearm near drugs, drug paraphernalia, or drug money may support an inference that the defendant possessed the firearm at the ready to protect the drugs, the drug money, or the defendant during a drug transaction, such that the firearm facilitated the drug-trafficking crime.

If the prosecution has not proved beyond a reasonable doubt *both* of the essential elements of this offense against the defendant, then you must find the defendant not guilty of the "possession of a firearm in furtherance of drug trafficking" offense charged in **Count 7** of the Indictment. On the other hand, if the prosecution has proved beyond a reasonable doubt *both* of the essential elements of this offense against the defendant, then you must find him guilty of the

"possession of a firearm in furtherance of drug trafficking" offense charged in **Count 7**.

FINAL INSTRUCTION NO. 8 - COUNT 8: THE MONEY-LAUNDERING CONSPIRACY

Count 8 of the Indictment charges that, between about 2003 and May 2006, defendant David Nieman knowingly and unlawfully conspired with other persons, whose names are known and unknown to the Grand Jury, to conduct and to attempt to conduct financial transactions that involved proceeds of distributing and possessing with intent to distribute methamphetamine with the intent to promote the carrying on of that unlawful activity, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity. The defendant denies that he committed this "money-laundering conspiracy" offense.

For you to find the defendant guilty of this "money-laundering conspiracy" offense, the prosecution must prove beyond a reasonable doubt *all* of the following essential elements:

One, between about 2003 and May 2006, two or more persons reached an agreement or came to an understanding to commit the money-laundering offense alleged to be the objective of the conspiracy.

> In Final Jury Instruction No. 2, in the explanation to element *one*, beginning on page 39, I explained the requirements to prove an illegal agreement for a conspiracy charge. That explanation applies here, as well.
>
> This "money-laundering conspiracy" charge alleges that the conspirators agreed to conduct and to attempt to

> conduct financial transactions that involved proceeds of distributing and possessing with intent to distribute methamphetamine with the intent to promote the carrying on of that unlawful activity, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity. I have set out briefly the elements of this "objective" in Preliminary Jury Instruction No. 11, beginning on page 21.

Two, the defendant voluntarily and intentionally joined in the agreement or understanding, either at the time it was first reached or at some later time while it was still in effect.

> In Final Jury Instruction No. 2, in the explanation to element *two*, beginning on page 41, I explained the requirements to prove that the defendant joined in an illegal agreement or understanding. That explanation applies here, as well.

Three, at the time that the defendant joined in the agreement or understanding, he knew the essential purpose of the agreement or understanding.

> As I also explained in Final Jury Instruction No. 2, the defendant must have known of the existence and purpose of the conspiracy. Without such knowledge, the defendant cannot be guilty of the conspiracy offense, even if his acts furthered the conspiracy.

If the prosecution does not prove beyond a reasonable doubt *all* of the essential elements of this offense as to the defendant, then you must find him not guilty of the "money-laundering conspiracy" offense charged in **Count 8** of the Indictment. On the other hand, if the prosecution does prove beyond a reasonable

doubt *all* of the essential elements of this offense against the defendant, then you must find him guilty of the "money-laundering conspiracy" charged in **Count 8**.

FINAL INSTRUCTION NO. 9 - IMPEACHMENT

In Preliminary Instruction No. 16, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be "impeached."

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

You have heard evidence that some witnesses have each been convicted of a crime. You may use that evidence only to help you decide whether or not to believe these witnesses and how much weight to give their testimony.

You should treat the testimony of certain witnesses with greater caution and care than that of other witnesses:

1. You have heard evidence that James Mariner testified pursuant to a plea agreement and hopes to receive a reduction in his sentence in return for his cooperation with the government in this case. If the prosecutor handling such a witness's case believes that the witness has provided

"substantial assistance," the prosecutor can file a motion to reduce the witness's sentence. The judge has no power to reduce a sentence for such a witness for substantial assistance unless the U.S. Attorney files a motion requesting such a reduction. If the motion for reduction of sentence for substantial assistance is filed by the U.S. Attorney, then it is up to the judge to decide whether to reduce the sentence of that witness at all, and if so, how much to reduce it. You may give the testimony of such witnesses such weight as you think it deserves. Whether or not testimony of a witness may have been influenced by the witness's hope of receiving a reduction in sentence is for you to decide.

2. You have also heard evidence that James Mariner, Jill Siems, and Brent Michaelson participated in one or more of the crimes charged in this case. Their testimony was received in evidence and you may consider it. You may give the testimony of such a witness such weight as you think it deserves. Whether or not the testimony of such a witness may have been influenced by his or her desire to please the government or to strike a good bargain with the government about his or her own situation is for you to determine.

3. You have also heard evidence that Brent Michaelson is testifying pursuant to a "limited use immunity letter," which mean that he has received a promise from the Government that his testimony will not be used against him in a criminal case. His testimony was received in evidence and you may consider it. You may give the testimony of such a witness such weight as you

think it deserves. Whether or not the testimony of such a witness may have been influenced by the immunity promise is for you to determine.

* * *

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness's testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 10 - PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

The defendant is presumed innocent of each of the charges against him and, therefore, not guilty of those offenses. This presumption of innocence requires you to put aside all suspicion that might arise from the arrest or charge of the defendant or the fact that he is here in court. The presumption of innocence remains with the defendant throughout the trial. That presumption alone is sufficient to find him not guilty. The presumption of innocence may be overcome as to a particular charge against the defendant only if the prosecution proves, beyond a reasonable doubt, all of the elements of that offense against him.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant to prove his innocence. Therefore, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses who are called to testify by the prosecution. Similarly, you must not consider the fact that the defendant did not testify in any way, or even discuss it, in arriving at your verdict.

Unless the prosecution proves beyond a reasonable doubt that the defendant has committed each and every element of an offense charged against him, you must find him not guilty of that offense.

FINAL INSTRUCTION NO. 11 - REASONABLE DOUBT

I have previously instructed you that the prosecution must prove a charged offense "beyond a reasonable doubt" for you to find the defendant guilty of that charged offense. A reasonable doubt may arise from the evidence produced by either the prosecution or the defendant, keeping in mind that the defendant never has the burden or duty of calling any witnesses or producing any evidence. It may also arise from the prosecution's lack of evidence. A reasonable doubt is a doubt based upon reason and common sense. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

FINAL INSTRUCTION NO. 12 - DUTY TO DELIBERATE

A verdict must represent the considered judgment of each juror. *Your verdict on each charge against the defendant must be unanimous*. It is your duty to consult with one another and to deliberate with a view to reaching agreement if you can do so without violence to your individual judgment. Of course, you must not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict. Each of you must decide the case for yourself; but you should do so only after consideration of the evidence with your fellow jurors.

In the course of your deliberations you should not hesitate to re-examine your own views, and to change your opinion if you are convinced that it is wrong. To bring twelve minds to an unanimous result, you must examine the questions submitted to you openly and frankly, with proper regard for the opinions of others and with a willingness to re-examine your own views.

Remember that if, in your individual judgment, the evidence fails to establish the defendant's guilt beyond a reasonable doubt on an offense charged against him, then he should have your vote for a not guilty verdict on that offense. If all of you reach the same conclusion, then the verdict of the jury must be not guilty for the defendant on that offense. Of course, the opposite also applies. If, in your individual judgment, the evidence establishes the defendant's guilt beyond a reasonable doubt on an offense, then your vote should be for a verdict of guilty against the defendant on that charge, and if all of you reach that conclusion, then the

verdict of the jury must be guilty for the defendant on that offense. As I instructed you earlier, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of an offense charged against the defendant, or you cannot find the defendant guilty of that offense.

Remember, also, that the question before you can never be whether the government wins or loses the case. The government, as well as society, always wins, regardless of whether your verdict is not guilty or guilty, when justice is done.

Finally, remember that you are not partisans; you are judges—judges of the facts. Your sole interest is to seek the truth from the evidence. You are the judges of the credibility of the witnesses and the weight of the evidence.

You may conduct your deliberations as you choose. However, I suggest that you carefully consider all of the evidence bearing upon the questions before you. You may take all the time that you feel is necessary.

There is no reason to think that another trial would be tried in a better way or that a more conscientious, impartial, or competent jury would be selected to hear it. Any future jury must be selected in the same manner and from the same source as you. If you should fail to agree on a verdict, the case is left open and must be disposed of at some later time.

FINAL INSTRUCTION NO. 13 - DUTY DURING DELIBERATIONS

There are certain rules you must follow while conducting your deliberations and returning your verdict:

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, if the defendant is guilty, the sentence to be imposed is my responsibility. You may not consider punishment of the defendant in any way in deciding whether the prosecution has proved its case against him beyond a reasonable doubt.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible, either in writing or orally in open court. *Remember that you should not tell anyone—including me—how your votes stand numerically*.

Fourth, your verdict must be based solely on the evidence and on the law in these instructions. Therefore, you must return a separate, unanimous verdict on each charge against the defendant. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Fifth, in your consideration of whether the defendant is not guilty or guilty of an offense charged, you must not consider that defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the

defendant on any charge unless you would return the same verdict for that charge without regard to the defendant's race, color, religious beliefs, national origin, or sex. To emphasize the importance of this consideration, the verdict form contains a certification statement. Each of you should carefully read the statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects the manner in which each of you reached your decision.

Finally, I am giving you the verdict form. A verdict form is simply the written notice of the decision that you reach in this case. You will take the verdict form to the jury room. When you have reached a unanimous verdict, your foreperson must complete one copy of the verdict form and all of you must sign that copy to record your individual agreement with the verdict and to show that it is unanimous. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict. When you have reached a verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

DATED this 22nd day of February, 2007.

Mark W. Bennett

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID NIEMAN, Defendant.	No. CR 06-3021-MWB **VERDICT FORM**

_____

As to defendant David Nieman, we, the Jury, unanimously find as follows:

<table>
<tr><th colspan="3">COUNT 1: DRUG CONSPIRACY</th><th>VERDICT</th></tr>
<tr><td>Step 1:
Verdict</td><td colspan="2">On the “drug conspiracy” offense charged in Count 1, as explained in Final Jury Instruction No. 2, please mark your verdict. (If you found the defendant “not guilty,” do not consider the question in Step 2. Instead, go on to consider your verdict on Count 2. However, if you found the defendant “guilty” of Count 1, please answer the question in Step 2 of this section of the Verdict Form.)</td><td>____ Not Guilty

____ Guilty</td></tr>
<tr><td>Step 2:
“Objectives” and quantity of controlled substances</td><td colspan="3">If you found the defendant “guilty” of the “drug conspiracy” charge in Count 1, please indicate the “objective” or “objectives” of the conspiracy and the quantities of each controlled substance involved for which the defendant can be held responsible. (Quantity of controlled substances is explained in Final Jury Instruction No. 5.)</td></tr>
<tr><td rowspan="2"></td><td>_____ distributing a methamphetamine mixture</td><td>_____ 500 grams or more
_____ 50 grams or more, but less than 500 grams
_____ less than 50 grams</td></tr>
<tr><td>_____ distributing actual (pure) methamphetamine</td><td>_____ 50 grams or more
_____ 5 grams or more, but less than 50 grams
_____ less than 5 grams</td></tr>
</table>

<table>
<tr><th colspan="2">COUNT 2: DISTRIBUTION</th><th>VERDICT</th></tr>
<tr><td colspan="2">On the charge of distributing a methamphetamine mixture on or about May 3, 2006, as charged in Count 2 and explained in Final Jury Instruction No. 3, please mark your verdict.</td><td>____ Not Guilty
____ Guilty</td></tr>
<tr><th colspan="2">COUNT 3: DISTRIBUTION</th><th>VERDICT</th></tr>
<tr><td colspan="2">On the charge of distributing a methamphetamine mixture on or about May 12, 2006, as charged in Count 3 and explained in Final Jury Instruction No. 3, please mark your verdict.</td><td>____ Not Guilty
____ Guilty</td></tr>
<tr><th colspan="2">COUNT 4: DISTRIBUTION</th><th>VERDICT</th></tr>
<tr><td colspan="2">On the charge of distributing a methamphetamine mixture on or about May 13, 2006, as charged in Count 4 and explained in Final Jury Instruction No. 3, please mark your verdict.</td><td>____ Not Guilty
____ Guilty</td></tr>
<tr><th colspan="2">COUNT 5: POSSESSION WITH INTENT TO DISTRIBUTE</th><th>VERDICT</th></tr>
<tr><td>Step 1:
Verdict</td><td>On the charge of possessing, with intent to distribute, actual (pure) methamphetamine, as charged in Count 5 and explained in Final Jury Instruction No. 4, please mark your verdict. (If you find the defendant “not guilty,” do not consider the question in Step 2. Instead, go on to consider your verdict on Count 6. However, if you find the defendant “guilty” of this “possession with intent to distribute” offense, please answer the question in Step 2 of this section of the Verdict Form.)</td><td>___ Not Guilty

____ Guilty</td></tr>
<tr><td rowspan="2">Step 2:
Quantity of actual (pure) methamphet-amine</td><td colspan="2">If you found the defendant “guilty” of this “possession with intent to distribute” offense, please indicate the quantity of actual (pure) methamphetamine involved in the offense for which the defendant can be held responsible. (Quantity of controlled substances is explained in Final Jury Instruction No. 5.)</td></tr>
<tr><td colspan="2">_____ 50 grams or more of actual (pure) methamphetamine
_____ 5 grams or more, but less than 50 grams, of actual (pure) methamphetamine
_____ less than 5 grams of actual (pure) methamphetamine</td></tr>
</table>

COUNT 6: DRUG USER IN POSSESSION OF A FIREARM		**VERDICT**
Step 1: Verdict	On the "drug user in possession of a firearm" offense, as charged in **Count 6** and explained in Final Jury Instruction No. 6, please mark your verdict. (*If you find the defendant "not guilty," do not consider the question in **Step 2**. Instead, go on to consider your verdict on **Count 7**. However, if you find the defendant "guilty" of this "drug user in possession of a firearm" offense, please answer the question in **Step 2** of this section of the Verdict Form.*)	___ Not Guilty ____ Guilty
Step 2: Firearms involved	*If you found the defendant "guilty" of this "drug user in possession of a firearm" offense,* please indicate which one or more of the following firearms you unanimously agree the defendant possessed while he was an unlawful user of controlled substances.	
	_____ (a) a Remington, 12 gauge shotgun, serial no. PC466231	
	_____ (b) a Benelli Super Black Eagle, 12 gauge shotgun, serial no. U291915	
	_____ (c) a Hi-Point Firearms, 9mm semi-auto rifle, serial no. B65913	
	_____ (d) a Charles Daly, 12 gauge shotgun, serial no. 3116078	
	_____ (e) a Savage Arms, .22 caliber bolt-action rifle, serial no. 939752	
	_____ (f) a Stevens Model 34 Savage Arms, .22 caliber rifle, no serial number	
	_____ (g) a Taurus, 9mm semi-auto pistol, serial no. TLJ82613D	
	_____ (h) a Ruger 10/22 carbine, .22 caliber semi-auto rifle, serial no. 122-60046	
COUNT 7: POSSESSION OF A FIREARM IN FURTHERANCE OF DRUG TRAFFICKING		**VERDICT**
Step 1: Verdict	On the "possession of a firearm in furtherance of drug-trafficking" offense, as charged in **Count 7** and explained in Final Jury Instruction No. 7, please mark your verdict. (*If you find the defendant "not guilty," do not consider the question in **Step 2**. Instead, go on to consider your verdict on **Count 8**. However, if you find the defendant "guilty" of this offense, please answer the question in **Step 2** of this section of the Verdict Form.*)	___ Not Guilty ____ Guilty

Step 2: Firearms involved	*If you found the defendant "guilty" of this offense,* please indicate which one or more of the following firearms you unanimously agree the defendant possessed in furtherance of drug trafficking and the offense or offenses in furtherance of which he possessed that firearm.
	_____ possession of a Hi-Point Firearms, 9mm semi-auto rifle, serial no. B65913 in furtherance of _____ **Count 1** (drug conspiracy) _____ **Count 5** (possession with intent to distribute).
	_____ possession of a Taurus, 9mm semi-auto pistol, serial no. TLJ82613D in furtherance of _____ **Count 1** (drug conspiracy) _____ **Count 5** (possession with intent to distribute).

COUNT 8: MONEY-LAUNDERING CONSPIRACY	**VERDICT**
On the "money-laundering conspiracy" offense charged in **Count 8**, as explained in Final Jury Instruction No. 8, please mark your verdict.	____ Not Guilty ____ Guilty

CERTIFICATION

By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the offenses charged regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

_____
Date

_____ _____
Foreperson Juror

_____ _____
Juror Juror

_____ _____
Juror Juror

_____	_____
Juror	Juror
_____	_____
Juror	Juror
_____	_____
Juror	Juror